UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
WASHINGTON, DC

SOS INTERNATIONAL LLC,	)		
	)		
Respondent,	)		
	)	Case Nos.	21-CA-178096
And	)		21-CA-185345
	)		21-CA-187995
PACIFIC MEDIA WORKERS GUILD, COMMUNICATIONS WORKERS OF AMERICA, LOCAL 39521, AFL-CIO,	)		
	)		
Charging Party	)		

RESPONDENT'S BRIEF IN SUPPORT OF ITS EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

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STATEMENT OF CASE

This case arises out of a series of unfair labor practice charges filed against SOS International LLC (SOSi) by Pacific Media Workers Guild Local 39521 (Union). These charges were premised upon the proposition that language interpreters working in the United States immigration courts were statutory employees rather than independent contractors, as classified by SOSi. (GC Exh. 1(a)-(z)).[1] The Regional Director issued a Consolidated Complaint on May 31, 2017. (GC Exh. 1(bb)). SOSi filed a timely Answer on June 12, 2017, denying the material allegations of the Consolidated Complaint and raising certain affirmative defenses, including that the interpreters are independent contractors, and that the United States is a joint employer of the interpreters and Respondent shares the government's exemption from the Act. (GC Exh. 1(dd)).

The case was heard in Los Angeles, California on September 25, 26, 27, 28 and 29, and in Washington, D.C. on October 10, 11, and 12, 2017, before Administrative Law Judge ("ALJ") Michael A. Rosas. On March 12, 2018, ALJ Rosas issued his recommended decision, finding that the interpreters are employees under the Act, and that Respondent violated the Act in certain respects. Respondent now files its exceptions to the ALJ's decision and this supporting brief.

SUMMARY OF MATERIAL FACTS

SOSi is a federal government contractor. At the heart of this case is SOSi's contract with the United States Department of Justice ("DOJ"), Executive Office for Immigration Review ("EOIR"), Language Services Unit ("LSU"). EOIR is a separate agency within the DOJ that adjudicates immigration cases, and it oversees the immigration courts through the Office of the

[1] Citations to the ALJ's decision are formatted as follows: (JD page: line). Citations to "Tr." refers to the transcript of these proceedings. All references to admitted Exhibits are designated as "GC Exh. _" (General Counsel Exhibits), followed by the exhibit number; "R. Exh. _" (Respondent Exhibits), followed by the exhibit number; and "JX Exh. _" (Joint Exhibits), followed by the exhibit number.

Chief Immigration Judge ("OCIJ"). (JX 1(a) ¶ C.2, JX 1(f) ¶ C.2). Under its contract with EOIR ("EOIR Contract"), SOSi provides interpreters to the immigration courts using freelance interpreters with whom it enters into Independent Contractor Agreements ("ICAs"). (JX 1(a) ¶¶ C.1, JX 1(f) ¶¶ C.1, Tr. 1043-1045). EOIR also uses its own staff interpreters to supplement those provided by SOSi. (JX 1(a) ¶ C.3, JX 1(f) ¶ C.3). The LSU, OCIJ, and court administrators oversee all interpreters working at the immigration courts. (*Id.* at ¶ C.2).

SOSi first acquired the EOIR Contract in July 2015. (JX 1(a), Tr. 1043-1044). This contract consisted of an initial one-year term (September 1, 2015 through August 31, 2016), with four additional option years.[2] (JX 1(a) ¶ B.1, Tr. 1078). Prior to SOSi's acquisition of the EOIR Contract, interpreters had been provided to the immigration courts for more than 15 years by Lionbridge, and other predecessor interpretation companies. (Tr. 1045, 712-714). Throughout the entire history of the EOIR contract interpreter program, interpreters have always been classified as independent contractors, a conclusion never previously questioned. (*See* Tr. 304, 324).

The EOIR Contract comprehensively governs EOIR's and SOSi's relationship with the interpreters. Initially, it establishes the qualifications interpreters must possess to work in the immigration courts. (Tr. 1056-1058, 1069-1070). An interpreter must be: (1) a United States citizen or lawful permanent resident; (2) certified for judicial interpreting or have at least one year of courtroom interpreting experience; (3) fluent in both English and the foreign language (including in immigration and legal vocabulary); (4) familiar with the EOIR Code of Professional Responsibility; (5) skilled at various styles of interpretation; (6) able to convey the

[2] On July 10, 2017, SOSi executed a modification with the DOJ, effective September 1, 2017, which altered the terms of the EOIR Contract to address ongoing monetary losses and hardship that SOSi was experiencing under the July 2015 EOIR Contract. (JX 1(f)). Unless noted otherwise, it is not materially different from the July 2015 EOIR Contract in relevant part.

speaker's tone and emotional level; and (7) able to maintain the appropriate speed and projection while interpreting. (JX 1(a) ¶ C.3.5, JX 1(f) ¶ C.3.5).

For the first year of the EOIR Contract, SOSi exclusively utilized former Lionbridge interpreters, who EOIR deemed ready to work ("RTW") once they entered into a contract with SOSi. (Tr. 1395). Thereafter, over an extended period of time, SOSi developed, with EOIR's approval, a process for obtaining qualified new, non-Lionbridge interpreters. (Tr. 1059-1063). This process involved an initial screening test developed and administered by Southern California School of Interpretation ("SCSI"). (Tr. 1055, 1058-1060). Interpreters who passed the test were eligible to receive EOIR-specific training and take a final test to ensure that their language skills met the EOIR's standards. (*Id.*).

The EOIR Contract also sets forth the procedures and rules that interpreters must abide by while working in immigration courts. Interpreters are required to wear SOSi-issued identification badges. (JX 1(a) ¶ C.3.12(a), JX 1(f) ¶ C.3.12(a), GC Exh. 31). SOSi is also required to provide each interpreter with the following EOIR documents: (1) EOIR Immigration Court Interpreter Handbook; (2) Immigration Court Terminology List; (3) Immigration Court Operating Guidelines for Contract Interpreters; (4) Code of Professional Responsibility; and (5) Confidentiality Agreement. (JX 1(a) ¶¶ C.3.9, 11, H.4(d); JX 1(f) ¶¶ C.3.9, 11, H.4(d)). These documents establish various policies and procedures with which interpreters must comply.

SOSi is also required to implement a quality assurance plan approved by LSU, (JX 1(a) ¶ C.3.6, JX 1(f) ¶ C.3.6), which includes bi-annual evaluations of each interpreter. [3] (JX 1(a) ¶ C.3.7.1(b)). EOIR also reserves the right to "disqualify" interpreters due to "poor performance,

[3] In September 2017, SOSi and the EOIR reduced this requirement to one time per year. (JX 1(f) ¶ C.3.7.1(b)). As of the close of the hearing, SOSi was out of compliance with this provision, and very few former Lionbridge interpreters had ever been evaluated by SOSi. (Tr. 93, 151, 411).

inappropriate hygiene/appearance/conduct, security concerns, or any other reason based on a failure to satisfy the requirements of the contract." (JX 1(a) ¶¶ C.3.8, C.3.13(e); JX 1(f) ¶¶ C.3.8, C.3.13(e); Tr. 1188). The process for disqualifying interpreters—including the ultimate decision on disqualification—is dictated completely by LSU. (Tr. 1481-1483). This process typically starts with a judge, attorney, or member of the court's staff lodging a complaint against an interpreter, which is reviewed by LSU. (*Id.*) LSU then forwards the complaint to SOSi, typically in an email. (*See id.*, Tr. 1190, 1379). Depending on the issue, LSU may disqualify an interpreter for a specific language, alien, judge, or court, or for all immigration courts. (Tr. 1191-1195). LSU determines what the interpreter must do to resume working at the immigration court(s), which may involve additional training and retesting. (*See id.*; Tr. 1186, 1196). Any retesting is performed by SCSI. (Tr. 1193). SOSi may request an interpreter's reinstatement, but LSU retains sole discretion to decide whether the interpreter will be reinstated to work. (Tr. 1196, *see* JX 2).

SOSi began performing at immigration courts nationwide on December 1, 2015. (Tr. 1044, 1374). Initially, its operations were overseen by two Senior Program Managers, Claudia Thornton and Martin Valencia. (Tr. 1041-1042). On October 31, 2016, Charles O'Brien assumed this position. (Tr. 1042). Between July 2015 and December 1, 2015, SOSi encountered significant challenges in recruiting Lionbridge interpreters. (Tr. 1042, 1374, 1377). What SOSi did not anticipate was the resistance it would meet in contracting with Lionbridge interpreters. (Tr. 1367-1368). The initial ICAs proffered by SOSi ("ICA 0.0") were 24 pages long, excluding exhibits, and contained provisions that were more appropriate for a corporate subcontractor. (JX 1(i), Tr. 1367-1368). Also, SOSi's proposed rates were not well received. (*See e.g.*, GC Exh. 90).

Moreover, it quickly became apparent that the interpreter community (through email and various forms of social media) had banded together to adopt a united front. (*See e.g.*, GC Exh.

108). California was a critical state for SOSi, and negotiations between SOSi and a group of California Spanish interpreters led by Hilda Estrada, Angel Garay, and Diana Illarraza-Hernandez would set the stage for other negotiations throughout the country. (Tr. 1368-1375). To help facilitate these negotiations, interpreters rented an office adjacent to the immigration court in Los Angeles. (Tr. 755, 789, 796). The "give and take" of these negotiations is fully documented in emails exchanged between SOSi's representatives and the California interpreters, for whom Estrada was the principal spokesperson. (R. Exhs. 3, 11; GC Exh. 161, Tr. 663). On October 31, 2015, an agreement was reached with the southern California interpreters, which would become the template for the vast majority of ICAs throughout the country. (Tr. 599-601, 669-670; *see* GC Exhs. 4, 43, 80, 96, 113, 139, 162, 190, 222). This version ("ICA 1.0") was only 4 pages long, with some additional exhibits, and it included all of the principal terms and conditions that interpreters had desired and negotiated for, (JX 1(j); *see* Tr. 663-664), including the interpreters' desired half-day/full-day session rates of $225/$425 for non-travel cases. (Tr. 216, 329; *see e.g.*, GC Exh. 4, p. 7). Travel rates would be negotiated on a case-by-case basis. (Tr. 1317-1318). The ICA also contained language specifying that as independent contractors, interpreters could work for other agencies, and it included a 24-hour cancellation policy under which any cancellation with less than 24-hours' notice would result in full payment to the interpreter. (GC Exh. 4, p. 3, ¶ 13; GC Exh. 4, p. 8; Tr. 44, 375, 574, 608, 888, 968). Similar negotiations occurred with interpreters throughout the country. (*See* Tr. 1025-1026, JX 1(fff)).

Under the terms of the ICAs, the interpreters agreed to work as independent contractors, as needed, through August 31, 2016. (JX 1(j) ¶¶ 1, 2, 5, Attachment A). The interpreters acknowledged that they were not employees of SOSi and that the performance of their services shall be at their sole control and discretion. (JX 1(j) ¶ 5). Interpreters do not participate in any

SOSi benefit plan, are not provided unemployment insurance, pay their own income and Social Security taxes, and obtain their own workers' compensation insurance. (JX 1(j) ¶ 5). They maintain business licenses in their cities of residence, solicit business online, and deduct thousands of dollars of business expenses on their taxes. (*See e.g.*, R. Exh. 1; R. Exh. 2; R. Exh. 4; R. Exh. 5; Tr. 226-227, 374-375, 434-435)). Interpreters provide their own translation books and materials, and are responsible for any continuing education classes. (JX 1(j), Attachment A). All have gone through specialized education and training, and many have multiple years of education. (*See e.g.*, GC Exh. 296, pp. 2, 22, 30-32, 38-40). Although not required, many had state or federal certifications prior to rendering their services to SOSi. (*See e.g.*, R. Exh. 13).

"Regional coordinators" offer work to and schedule interpreters for assignments at the immigration courts based on the number of work orders placed by EOIR. (Tr. 1427-1428; GC Exhs. 7, 12). Coordinators fill orders for their designated geographical region in the country (e.g., Southern California and Arizona). (Tr. 1427). Interpreters do not have set work schedules, but instead send their availability to their coordinator several weeks to one month in advance. (Tr. 1427-1428, 1431). Interpreters are free to communicate their preferences on work assignments, judges, and schedules. (GC Exh. 56; *see* Tr. 1147). Interpreters may, without penalty, decline assignments. (Tr. 156, 345-346, 939, 1020, 1429-1430, 1434-1437, 1446-1447). If the interpreter declines, the coordinator offers the assignment to another interpreter. (Tr. 1429-1430). If the interpreter accepts, the coordinator sends the details of the assignment to the interpreter. (*Id.*). If travel is involved, the interpreter and coordinator negotiate a rate for that travel, unless the interpreter has previously negotiated a standard one. (R. Exhs. 27-35, Tr. 1415, 1451). When an interpreter accepts an assignment, the interpreter agrees to cover that case, but if he or she later cancels the assignment, SOSi has no recourse. (Tr. 1435).

All regional coordinators, save one, are based out of SOSi's operational headquarters in Reston, Virginia. (Tr. 1144-1145). The interpreters typically never meet their coordinator in person. (Tr. 1456). No coordinators are present at the courts, and all communication occurs by email, telephone, and text message. (Tr. 53, 93, 504, 732, 889). The only individual who has any connection to SOSi and who sometimes is present at the immigration courts is the "liaison." (Tr. 1172-1173). But the liaison is also an interpreter who provides interpreting services under an ICA in the same fashion as other interpreters. (*Id.*) The liaisons sometimes perform on-site courthouse orientations for new interpreters, acquainting them with the check-in window and courtrooms, security procedures, and equipment. (Tr. 1172-1173, 1217-1218, 1323-1324). On occasion, a liaison may coordinate situations where one interpreter is running late and a switch can be made so that all cases are covered. (Tr. 196).

Interpreters may swap or "reassign" cases among one another with SOSi's approval, and sometimes did so without informing SOSi, without any consequence. (GC Exh. 10, GC Exh. 12, GC Exh. 14, GC Exh. 60, R. Exh. 22, 26). SOSi requests that interpreters notify their coordinator before transferring a case to another interpreter to ensure that the name of the interpreter assigned to the hearing in EOIR's computer system matches the name of the interpreter submitting the documentation for payment. (Tr. 1440-1442, 1449-1450). Where that does not occur, reimbursement issues will arise. (*Id.*, R. Exh. 25).

SOSi exercises no control over the performance of the interpreters' actual work. (Tr. 151-152, 438-441). The immigration courts control all requests for interpreters, decide the language required, and set the date, time, and location of the hearing. (JX 1(a) ¶ H.2.3(a); JX 1(f) ¶ H.2.3(a)). To the extent there are rules that interpreters must abide by in the courtroom, those rules come directly from EOIR or immigration courts themselves, including rules on proper

dress, standards on professionalism, and how to handle the court's interpreting equipment. (*See* GC Exh. 144; R. Exh. 38; GC Exhs. 15-16; R. Exh. 38; Tr. 1186, 1379)). The only specific SOSi-generated policy is the Code of Business Ethics and Conduct, which was attached to ICA 1.0.[4] All other policies emanated from EOIR.

Interpreters retain discretion on how to interpret, subject to the preferences of the presiding judge. SOSi does not dictate the mode of interpretation, nor does it provide instruction on how to interpret. (Tr. 150, 152; JX 1(hhh), p. JX000985). As one might expect, the presiding judges dictate when and whether interpreters are permitted to take rest or lunch breaks. (Tr. 365-369). SOSi exercises no control over the courtrooms. (Tr. 187, 328). Interpreters are required by EOIR to use its Digital Audio Recording ("DAR") system, which, depending on the mode of interpreting utilized, is comprised of either table-mounted microphones or a combination of wireless transmitters and receivers. (JX 1(hhh), pp. JX000971, 979). The DAR is not owned or maintained by SOSi. (*Id.* at p. JX000980). SOSi does not provide the interpreters with any other equipment to perform their work. SOSi compensates interpreters either by the job or per hour, depending on the payment scheme negotiated by the interpreter and SOSi at the outset of the contracting relationship. (JX 1(fff), (ggg)). The EOIR Contract also requires that interpreters complete the EOIR Certification of Interpretation form ("COI") for all interpreting assignments. (JX 1(a) ¶ C.3.13; JX 1(f) ¶ C.3.13). When an interpreter completes a hearing, the judge signs the COI and the interpreter then submits the form to SOSi to receive payment. (Tr. 1053). SOSi processes payment on a net-30 basis, meaning that the interpreter receives his or her payment 30 days after the invoice is submitted to SOSi for processing. (GC Exh. 18, Tr. 513).

[4] The Code of Business Ethics and Conduct was removed in subsequent versions of the ICA as SOSi determined that its use was only required for large subcontractors whose subcontracts were valued well in excess of each interpreter's ICA. (Tr. 1303-1306).

During the first year of the EOIR Contract, SOSi lost in the neighborhood of $2,000,000 per month, primarily as a result of unsustainably high pay rates for interpreters, excessive travel costs, and high administrative costs. (Tr. 1246-1247, 1315-1316, 1318, 1324-1325). These losses could not be sustained, and as the initial ICAs were scheduled to terminate on August 31, 2016, SOSi sought to negotiate new rates for interpreters that would more closely approximate standard market rates. (Tr. 1246-1247, 1307). During these renegotiations, SOSi offered interpreters a series of 30, 45 or 60-day extensions to allow time to solicit requests for proposals/quotes, known as "RFQs" from the interpreters. These RFQs requested that interpreters submit bids based on hourly rates not to exceed $35 for Spanish, $44 for common languages, and $50 for uncommon languages. (*Id.*) Although these rates were described as "not to exceed" and "maximums," interpreters successfully negotiated rates above these stated maximums. (Tr. 1323-1324; *see* JX 1(ggg), Parts B-D). If the interpreter and SOSi could not agree on an hourly rate, the interpreter was offered a modification to his or her existing ICA with the same rate of pay. (Tr. 1267-1268, 1331-1332).

In July 2017, SOSi began its renewal process for the ICAs that were set to expire on August 31, 2017. (GC Exh. 211, Tr. 1102-1103, JX 1(v), (x), (y)). SOSi offered incentives to entice interpreters still on a half-day/full-day rate structure to convert to an hourly structure. (*See id.*). These incentives were partially successful, and some interpreters agreed to the changes. (*See* JX 1(ggg)). If an interpreter and SOSi were unable to agree on an hourly rate, the interpreter was offered a modification to his or her existing ICA with the same rate of pay. (Tr. 1331-1332).

STATEMENT OF ISSUES

1. Whether the interpreters are statutory employees, rather than independent contractors under Section 2(3) of the Act? [Exceptions 1-41, 51, 52, and 57].

2. Alternatively, whether the United States is a joint employer of the interpreters and Respondent shares the government's exemption from the Act? [Exception 54, 55, and 57].

3. Whether Respondent violated Sections 8(a)(3) and (1) of the Act by refusing to renew or continue the ICAs of Jo Ann Gutierrez-Bejar, Hilda Estrada, Stephany Magana, Kathleen Morris, Maria Portillo, and Patricia Rivadeneira? [Exceptions 47, 48, and 57].

4. Whether the ALJ erred in ordering SOSi to reclassify all interpreters as statutory employees and issuing his recommended Notice to Employees? [Exceptions 51, 52, 56, and 57].

5. Whether Respondent violated Section 8(a)(1) of the Act in various respects? [Exceptions 42, 43, 44, 45, 46, 49, 50, 53, and 57].

ARGUMENT

A. The Interpreters Are Independent Contractors Under Section 2(3).

Section 2(3) of the Act explicitly excludes from the definition of "employee" any "individual having the status of an independent contractor." 29 U.S.C. § 152(3). "The obvious purpose of this amendment was to have the Board and the courts apply general agency principles in distinguishing between employees and independent contractors under the Act." *NLRB v. United Insurance Co. of America*, 390 U.S. 254, 256 (1968). The Board and the courts historically have looked to the factors set forth in the Restatement (Second) of Agency § 220(2) (1958): (a) the extent of control which, by the agreement, the master may exercise over the details of the work; (b) whether or not the one employed is engaged in a distinct occupation or business; (c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision; (d) the skill required in the particular occupation; (e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work; (f) the length of

time for which the person is employed; (g) the method of payment, whether by the time or by the job; (h) whether or not the work is part of the regular business of the employer; (i) whether or not the parties believe they are creating the relation of master and servant; and (j) whether the principal is or is not in the business.

"[A]ll of the incidents of the relationship must be assessed and weighed with no one factor being decisive. What is important is that the total factual context be assessed in light of the pertinent common-law agency principles." *United Insurance*, 390 U.S. at 258. The Restatement factors are nonexclusive and "other relevant factors may be considered, depending on the circumstances;" further, "the weight to be given a particular factor or group of factors depends on the factual circumstances of each case." *FedEx Home Delivery*, 361 NLRB No. 55, slip op. at 2 (2014). The Board also has considered, as an additional factor, the entrepreneurial opportunities for gain or loss. *Id.* at 3. "Related to this question, the Board has assessed whether purported contractors have the ability to work for other companies, can hire their own employees, and have a proprietary interest in their work." *Id.*

Although no single factor is determinative, the Board has never held that all factors are entitled to equal weight. Indeed, it has held the exact opposite:

> Not only is no one factor decisive, but the same set of factors that was decisive in one case may be unpersuasive when balanced against a different set of opposing factors. And though the same factor may be present in different cases, it may be entitled to unequal weight in each because the factual background leads to an analysis that makes that factor more meaningful in one case than in the other.

Roadway Package System, Inc., 326 NLRB 842, 850 (1998) (quoting *Austin Tupler Trucking*, 261 NLRB 183, 184 (1982)).

Respondent suggests that the Board has, in recent years, deviated from an assessment of the overall factual context in favor of a rather mechanistic approach aimed at narrowing the

independent contractor exemption and finding, except in rare cases, all putative independent contractors to be statutory employees. Recent decisions such as *FedEx Home Delivery*, 361 NLRB No. 55 (2014), *Minnesota Timberwolves Basketball, L.P.*, 365 NLRB No. 124 (2017), and *Pennsylvania Interscholastic Athletic Assoc.*, 365 NLRB No. 107 (2017) ("*PIAA*"), suggest a distinct bias against the concept of the independent contractor and a belief that individuals cannot legitimately function as independent business persons. Although not necessary to do so in order to find that the interpreters are independent contractors, Respondent contends that the Board should overrule/disavow the result-oriented analysis applied in these recent decisions.

1. The Overall Factual Context.

The status of court interpreters is a question of first impression for the Board. Indeed, Respondent has found only one court decision that addresses the status of interpreters, and on facts that are not dissimilar from those found here, the court concluded that the interpreters were independent contractors under the Fair Labor Standards Act. *Mateo v. Universal Language Corp.*, No. 13-CV-2495 NGG JO, 2015 WL 5655689, at *7 (E.D.N.Y. Sept. 4, 2015).

The analysis must start with the overall factual setting in which this case arises. EOIR is responsible for the operation of all immigration courts throughout the United States. Aliens who appear as respondents in the immigration courts arrive from all over the world and speak a myriad of different languages. Few are fluent in English. EOIR employs a small number of staff interpreters, and EOIR indisputably is itself an arm of the United States and exempt from coverage under the Act. The vast majority of interpreters who work in the immigration courts are obtained through federal contracts with private companies. Although EOIR does not mandate that such outside interpreters be either employees of the contractor or independent contractors, it

is undisputed that historically, all contract interpreters have been viewed and treated as independent contractors.

SOSi is a government contractor, and it maintains a number of contracts with different government agencies, of which the EOIR Contract is but one. SOSi does not operate, control, or have any stake in EOIR or the immigration courts. It employs no interpreters of its own, and it functions primarily as a liaison between EOIR and the national community of interpreters. Rather than EOIR contract directly with interpreters, SOSi assumed that function on behalf of EOIR. Thus, SOSi's primary function under the EOIR Contract is to do EOIR's bidding by assuring that when EOIR places an order, that order is filled with a qualified interpreter.

When it successfully acquired the EOIR Contract in July 2015, SOSi met considerable resistance in contracting with individual interpreters. The rates being offered by SOSi were deemed inadequate, and the proposed ICA was too complex and lengthy. In southern California, and across the country, the interpreters banded together to negotiate directly with SOSi over the terms of the ICA. As would become apparent, the interpreters held the upper hand. It is unrefuted that the interpreters expressed a specific desire to be independent contractors and not employees. The interpreters desired the flexibility that is inherent in being an independent contractor as opposed to being an employee. The interpreters also successfully negotiated half day and full day rates that were substantially higher than what they had been paid at Lionbridge. The reality was that SOSi could not fulfill its contractual obligations without reaching agreements with the interpreters, and the interpreters used this leverage to negotiate very favorable terms.

SOSi provides no tools or equipment to the interpreters, and maintains no facility where interpreters gather or are based. Instead, the interpreters operate out of their homes and they perform their services at the immigration courts. SOSi has no control over these courts and no

physical presence at the courts. The interpreters are highly skilled and they perform their services without any actual supervision or oversight by SOSi. Insofar as the work of the interpreters is monitored and critiqued, such evaluation comes from the immigration judges and LSU. All "counselings" and "disqualifications" are initiated by LSU, and the policies with which the interpreters must abide are those imposed by the courts and EOIR. The interpreters are completely free to accept or reject offered assignments as they wish. Some interpreters work fairly regularly at the immigration courts and others work only sporadically. Most interpreters perform interpreting services for other clients, often on a regular basis. They file tax returns as independent contractors and take deductions available to independent contractors.

In this factual context, it seems clear that certain of the Restatement factors are entitled to greater weight and significance than others. As explained below, SOSi contends that the two most important factors in this case are the intent of parties and the control exercised by SOSi over the details of the work. Also of particular significance are the type of occupation, the skill required, industry practice, manner of payment, and entrepreneurial opportunity. The remaining factors must also be considered, but the record suggests that the parties themselves viewed these other factors as of lesser importance.

2. The Extent-of-Control Factor Strongly Favors Independent Contractor Status.

The relevant inquiry for the extent-of-control factor is whether SOSi exercises control over the "details of the work." Restatement (Second) of Agency § 220(2)(a). As the Board explained in *American Broadcasting Co.*, 117 NLRB 13, 18 (1957), "where the person for whom the services are performed retains the right to control the manner and means by which the result is to be accomplished, the relationship is one of employment; while, on the other hand, where control is reserved only as to the result sought, the relationship is that of an independent

contractor." While the presence or absence of control over work details may not be determinative, this factor historically has been deemed one of major significance. Indeed, courts have referred to this factor as the "most important factor" under the common law. *Crew One Productions, Inc. v. NLRB*, 811 F.3d 1305, 1311 (11th Cir. 2016); *Salamon v. Our Lady of Victory Hospital*, 514 F.3d 217, 228 (2d Cir. 2008). The Supreme Court, in *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 751-752 (1989), stated that "[i]n determining whether a hired party is an employee under the general common law of agency, we consider the hiring party's right to control the manner and means by which the product is accomplished." The Court then proceeded to list "other factors relevant to the inquiry," suggesting a hierarchy in which the right to control the manner and means of performance ranks at, or near, the top. *See Metcalf & Eddy v. Mitchell*, 269 U.S. 514, 521 (1926) (independent judgment and discretion exercised by consulting engineers excludes "that control or right of control by the employer which characterizes the relation of employer and employee and differentiates the employee or servant from the independent contractor").

In his decision, the ALJ agreed that interpreters exercise broad judgment and independent discretion in how they carry out their work. (JD 45:1-15, 45: 39-75, 46:11-13). Nevertheless, he found that the extent-of-control factor only slightly favored independent contractor status, (JD 45:39), because "SOSi exercised control beyond what is required under its contract with EOIR" and "has begun to take a more active role in ensuring that interpreters meet EOIR's requirements." (JD 45:17-37). The ALJ suggested that SOSi (1) "retaliates" against interpreters who refuse assignments, (2) subcontracts with third-party contractor SCSI to review interpreters' work following a disqualification by LSU, (3) uses employees to conduct evaluations of interpreters' compliance with EOIR procedural requirements, (4) limits interpreters' ability to

work under other government contracts with the EOIR, (5) prohibits interpreters from exchanging assignments without prior approval, and (6) imposes a Code of Business Ethics & Conduct on interpreters. (JD 45:39-46:15). These findings, however, are either unsupported by the record or simply not relevant to the control issue.

Initially, there is no credible evidence that SOSi *retaliates* against interpreters for refusing interpreting assignments. Interpreters are free to refuse any offered assignment, and SOSi takes no disciplinary action when they do so. (Tr. 156, 345-346, 939, 1020, 1035-1036, 1434-1444; *see e.g.*, GC Exh. 257, R. Exhs. 32, 34). At most, coordinators may be more likely to offer assignments to interpreters who exhibit some degree of flexibility than to interpreters who set rigid parameters for any assignment. That phenomenon is not surprising, nor is it reflective of employee status. Independent contractors are business persons, and each interpreter of a specific language is a competitor of every other interpreter of that language in the same fashion that every community has multiple plumbers and electricians. The plumber or electrician who is never available when needed may find that calls for his/her services begin to dissipate.

Next, the fact that SOSi contracts with SCSI to review interpreters' work following a disqualification by LSU fails to show that SOSi controls the details of the actual interpreting work. LSU determines all disqualifications and reinstatements, and the EOIR Contract dictates that "Interpreters who are disqualified due to inadequate interpretation and who receive a failing score on the related recorded evaluation must be re-tested . . . and must receive a passing score prior to a reinstatement." (JX 1(f) ¶ C.3.8). There is no evidence in the record that SOSi does anything beyond what LSU dictates and the EOIR Contract requires. *Cardinal McCloskey Services*, 298 NLRB 434, 435 (1990) ("Enforcement of laws or government regulations, however, is not considered control over the 'manner and means' by which results are

accomplished, because such enforcement is, in reality, supervision by the government, not by the 'employer.'")

Similarly, SOSi's periodic use of liaison interpreters or program management to ensure that interpreters comply with EOIR procedural requirements (dress policies, security badge requirements, check in and out procedures, professional ethics codes, and proper use of equipment), is again a function of the EOIR Contract. SOSi merely responds to reports of violations from LSU, EOIR staff, and the immigration judges. This does not constitute control by SOSi. Moreover, ensuring that interpreters act professionally while in court, wear the appropriate dress, and understand how to use the EOIR's equipment are all parameters that control the ends of the work, not the means. As the Board stated in *Young & Rubicam International, Inc.*, 226 NLRB 1271, 1275 (1976):

> Perhaps the point is best conveyed by the following analogy drawn by the Administrative Law Judge in *Associated Musicians*: 'When one engages a contractor to build a house, the contractor does not become any less independent because the purchaser determines the kind of house, where it is to be placed, the kind of materials to be used, the times of construction, or even the times of day when building shall take place ....' 206 NLRB at 589.

The Code of Business Ethics & Conduct (which SOSi subsequently removed from the ICAs) contains no provisions that define how interpreters perform the details of their work. And in this day and age of extensive government regulation, companies who contract with the federal government routinely require those with whom it does business to comply with ethical policies. (Tr. 1303-1305; JX 1(a) ¶ I.1, JX 1(f) ¶ I.1). While the requirement that interpreters perform work only for SOSi at the EOIR may be marginally relevant to the interpreters' entrepreneurial opportunities, it is wholly irrelevant to SOSi's ability to control the details of the interpreters' work. So too is SOSi's request that interpreters not exchange assignments without prior notice and approval. In any event, there is no evidence that SOSi ever denied an interpreter's request to

transfer a case, and Regional Coordinator Haroon Siddiqi testified that there were no circumstances under which he could recall withholding approval of a request to transfer a case. (Tr. 1440).

When properly reviewed, the record strongly supports a finding that the interpreters carry out their assignments in an independent fashion without any meaningful oversight by SOSi. Whatever controls exist are imposed by EOIR, LSU, and the immigration judges. *See e.g.*, *Porter Drywall, Inc.*, 362 NLRB No. 6, slip op. at 3 (2015) (finding the control factor, especially discretion in how to complete work, supports a finding of independent contractor); *Pennsylvania Academy of the Fine Arts*, 343 NLRB 846, 847 (2004) ("*Pennsylvania Academy*") (finding independent contractor status to be "strongly support[ed]" where "the evidence establishes that the models retain significant discretion over how they perform their work").

In fact, Respondent is unaware of any Board or court decision finding an individual to be an employee when the right to control factor did not at least tilt somewhat in favor of employee status. This is true even in recent decisions where Respondent contends the Board has adopted something of a result-oriented approach. *See PIAA*, *supra* ("far-reaching" control by the putative employer); *Minnesota Timberwolves*, 365 NLRB No. 124, slip op. at 4, ("the [crew member] director receives significant input from the [employer director] for each and every game, both in meeting with the [employer director] before the game to review the [employer director's] rundown and in implementing the [employer director's] rundown and live calls while the game is in progress"); *FedEx Home Delivery*, 361 NLRB No. 55, slip op. at 12 (putative employer exercised "pervasive control" over individuals in question).

3. <u>The Parties' Intent Regarding the Nature of the Relationship Strongly Supports a Finding of Independent Contractor Status</u>.

Respondent contends that in the total factual context of this case, the second most

important factor is the intent of the parties. This is so because the manner in which the interpreters negotiated their ICAs demonstrates that the parties considered their mutual intent to be of paramount importance. (*See e.g.*, GC Exh. 161 (noting that as independent contractors, Rosas and other interpreters are responsible for all compensation-related taxes and that SOSi "can not [*sic*] tell us who to work for or not;" R Exh. 12 (Estrada noting that "We are currently, still contractors."). The interpreters desired such a relationship for a myriad of reasons, most notably the flexibility to turn down work and to control their own schedules, as well as the tax benefits of being an independent contractor. Independent contractor status was not unilaterally dictated by SOSi, but was a decision mutually desired by all parties. During the negotiations between SOSi and Estrada's group of interpreters, the interpreters expressly stated a desire to be treated as independent contractors, and in their written proposals, they referred to themselves as "Contractors." (R. Exh. 3, p. 3). Also, although the original version of Respondent's proposed ICA only restricted the interpreter from accepting work from anyone other than SOSi "in connection with SOSi's Prime Contract," the interpreters were concerned that this provision might be construed more broadly to preclude them from working for other clients. (GC Exh. 161, R. Exh. 3, p. 3). To resolve that concern, SOSi agreed to add language stating that the "restriction relates only to work to be performed by Contractor under the Prime Contract with DOJ EOIR," and that nothing in the ICA would "preclude Contractor from performing work under any other DOJ program or under any federal, state or local agency contract." (JX 1(j)).

Not only did the parties deem their mutual intent to be of prime significance, but the common law has always recognized the intent of the parties as "a significant factor" in determining whether an individual is an employee or an independent contractor. *Penn v. Howe-Baker Engineers, Inc.*, 898 F.2d 1096, 1103 n. 9 (5th Cir. 1990); *accord, Crew One, supra,* 811

F.3d at 1312 (Eleventh Circuit notes agreement of Ninth and D.C. Circuits). Where the parties' contract and its negotiation reflect a common intent to create an independent contractor relationship, there is no sound reason why the Board should step in and rewrite the contract's terms. Although the contracts clause of the United States Constitution (Art. I, § 10, Cl. 1), which prohibits the impairment of contracts, is directly applicable only to the states, the right of private parties to independently structure their contractual relationships should not be lightly disregarded, absent compelling reasons to do so. Of course, where the intent is reflected solely in the written agreement itself and that agreement is the product of fraud or duress, the Board, or a court, may find that the agreement does not truly establish mutual intent to create an independent contractor relationship. *See Penn, supra,* 898 F.2d at 1103 ("Penn never suggests that he was coerced into signing the Design Services Agreement or that the Agreement was a sham"); *Crew One, supra*, 811 F.3d at 1312 ("If the Board had found fraud, duress, or some other defense to formation, it would have been correct to disregard the agreements"). Absent such evidence, however, the intent of the parties becomes critical because it often "sheds light on a number of other factors, such as 'method of payment,' 'provision of employee benefits,' and 'tax treatment of the third party.'" *Penn, supra,* 898 F.2d at 1103, n. 9. Here, there is no evidence that the ICA was a "sham" or the product of fraud or duress.

Further, the ICA contains multiple indications of an intent to create an independent contractor relationship. The agreement itself bears the title "Independent Contractor Agreement," and throughout it refers to the interpreters as "Contractors." (JX 1(j)). Section 5, entitled "Independent Contractor," expressly provides that "Contractor is not an employee of the Company" and that "[t]he manner in which the Contractor's language interpretation and translation services are rendered shall be within the Contractor's sole control and discretion,

provided the Work is performed in accordance with the SOW." (*Id.* at ¶ 5). Section 5 further provides that "Contractor shall be responsible for all taxes arising from compensation and other amounts paid under this Agreement," that there will be no withholdings by SOSi, that the interpreter is not eligible to participate in any employee benefit plan, and that SOSi will not provide any workers' compensation insurance. (*Id.*) Section 6, entitled "Relationship of Parties," further emphasizes that the ICA shall not "be construed to form a partnership between the parties nor create an employment relationship." (*Id.* at ¶ 6). Thus, the ICA itself strongly suggests an intent to create an independent contractor relationship. As one court has observed:

> Indeed, though not quite rising to the level of estoppel, if a plaintiff signs a tax return "under penalty of perjury" that declares independent contractor status and seeks "numerous deductions for business purposes associated with independent contractor status, such as travel, entertainment, lodging, supplies, telephone and depreciation of business assets," such a tax return may significantly impede the plaintiff's ability to claim employee status for purposes of filing an overtime or minimum wage claim.

Deboissiere v. Am. Mod. Agency, No. 09 Civ. 2316, 2010 WL 4340642, at *3 (E.D.N.Y. Oct. 22, 2010).

The intent factor strongly supports a finding of independent contractor status. While the ALJ agreed that the intent factor favors independent contractor status here, he erred by failing to give it the substantial weight that is warranted under the facts of this case. (JD 52:28-40).

4. The Interpreters are Engaged in a Distinct Occupation or Business.

The ALJ found that the distinct-occupation-or-business factor favored employee status because: (1) "interpreters were prevented from passing out business cards or otherwise soliciting business for themselves while working for SOSi;" (2) "interpreters were at least relatively integrated into SOSi's operation;" (3) interpreters utilized SOSi's personnel and resources in scheduling assignments and receiving payment; and (4) interpreters wear SOSi-issued

identification badges with the company's motto, *Challenge Accepted*, while interpreting at the immigration courts (JD 46:39-47:17). The record, however, refutes the ALJ's conclusions.

It is the EOIR, not SOSi, who restricts interpreters from passing out business cards or soliciting business at the immigration courts. This requirement is very clearly memorialized in EOIR's "Immigration Court Operating Guidelines for Contract Interpreters," which tells interpreters expressly: "**Do not** solicit employment during your court assignment; handing out business cards, resumes, etc., is strictly prohibited and is grounds for disqualification." (GC Exh. 5, p. 4 (emphasis in original)). The interpreters readily understood that this limitation was part of their ethical obligations as official immigration court interpreters. (Tr. 411, 441, 730). SOSi does not impose any restrictions on soliciting business from other private interpreting clients.

While it is true that the interpreters are essential to SOSi's ability to perform under its contract with EOIR, that is not the inquiry under this factor. Many subcontractors are critical to the operations of the company with whom they contract. The employees of a company which supplies chassis systems, seats, or transmissions to General Motors are not employees of General Motors simply because their work is essential to GM's success. The question here is whether the interpreters are themselves engaged in a distinct business, and on this question, it is clear that they are. Although largely ignored by the ALJ, the record reflects that interpreters (1) regularly sought work from other agencies and individual interpreting clients, (Tr. 44, 375, 496, 562, 608-609, 799-800, 989, 1021-1023), (2) advertised the work they performed for other entities while under contract with SOSi, (R. Exhs. 1, 2, 4, 5 9, 10, 13, 36; GC Exh. 296, pp. 2, 9, 23, 31-32, 39-41), (3) maintained business licenses in their cities of residence, (4) created business cards, and (5) filed their tax returns as sole proprietors, using IRS's Schedule C Form 1040s, (R. Exhs. 1, 2, 4, 5; Tr. 226-227, 374-375, 434-435). On these IRS forms, interpreters deducted thousands of

dollars of business-related expenses, including office expenses, taxes and licenses, meals and travel expenses, continuing education classes, and cell phone and internet services, which is also consistent with the fact that the interpreters understood that they were not SOSi employees (*Id.*)

That assignments were offered to interpreters by SOSi's coordinators and that payments were coordinated through SOSi hardly undermines the interpreters' status as independent business persons. That is the nature of any contractual relationship between two parties. One party seeks goods or services from the other party. Typically, an order is placed by one party, which the other party fulfills, and payment is coordinated between the two parties on whatever terms are negotiated.

Finally, the fact that interpreters wear SOSi-issued identification badges with the company's motto, *Challenge Accepted*, when interpreting at the immigration courts, is of only marginal significance. While the ALJ correctly observed that the badge-requirement originates from EOIR, he found that "the badges given to interpreters do more to identify interpreters with SOSi than is required." (JD 47, n. 24). This finding is tenuous. The EOIR Contract states, in relevant part, that "[i]nterpreters shall have a Contractor-issued photo identification . . . for all assignments for which they interpret." (JX 1(a) ¶ C.3.12(a), JX 1(f) ¶ C.3.12(a)). That is what SOSi has done here. The notion that SOSi's inclusion of a company motto on a government-required identification badge transforms the interpreters from independent contractor to employees is strained. On balance, this factor clearly favors independent contractor status.

5. SOSi Exercises No Supervision Over Interpreters.

Like the extent-of-control factor, the supervision factor strongly favors the finding that the interpreters are independent contractors. Although the ALJ agreed that this factor weighed in favor of independent contractor status, he did not afford it sufficient weight. SOSi exercises zero

direct supervision or direction over the interpreters' actual work. Indeed, there is little opportunity for SOSi to do so. SOSi has no supervisors stationed at the immigration courts, and the regional coordinators with whom interpreters interact lack the skills necessary to direct the nature and manner in which interpreters perform their work. As for the liaisons, they are themselves interpreters, and are not alleged to be either "supervisors" or "agents" of Respondent. Whatever services they may provide SOSi in addition to normal interpreting cannot be deemed supervisory. The primary function of the liaisons is to perform an on-site orientation of the courthouse layout for new interpreters. On occasion, a liaison may coordinate situations where one interpreter is running late and a switch can be made so that all cases are covered. Insofar as the activities of the liaisons constitute "control," this control is by the interpreters themselves and is not attributable to SOSi. In *Minnesota Timberwolves Basketball, L.P.,* 365 NLRB No. 124, slip op. at 4-6 (2017), the employer's video crew included its own "director." In finding the crewmembers to be statutory employees, the Board noted that the crewmember director received considerable direction from the employer's own director. The Board, however, relied solely upon the direction given by the employer's director. The direction given by the crewmember director to other crewmembers was not considered, as it was not control by the employer. Here, the direction provided by the liaison is minimal and is based on his own knowledge and experience.

To the extent that there is any actual on-site supervision of the interpreters, such supervision comes from the EOIR staff and the immigration judges. The ALJ agreed, finding that "[t]he extensive skills, certification, and ethics required of interpreters all flow-down from EOIR" and "while in the courtroom, interpreters are subject to the instruction, supervision, and evaluation of immigration judges, not SOSi." (JD 45:39-43). The ALJ further acknowledged that

any control emanating from the EOIR requirements cannot be imputed to SOSi as those requirements evince control by the government, not SOSi. (JD 44:9-18).

The ALJ found that through the disqualification process, SOSi "monitors and appraises [interpreter] performance." However, this is an oversimplification. The process for disqualifying interpreters—including the ultimate decision on disqualification and any remedial measures—is dictated by LSU and the EOIR Contract and is not under SOSi's control. (Tr. 1180-1183, 1188, 1481-1483; *see* JX 2). Once an interpreter has received a disqualification, LSU determines what the interpreter must do, if anything, to be considered for reinstatement. SOSi has no decision making authority in this respect. Thus, any controls exercised throughout this process are evidence of control by the EOIR and not attributable to SOSi. *Dial-A-Mattress Operating Corp.*, 326 NLRB 884, 892-893 (2004) (taking measures to ensure customer desires are satisfied, such as penalizing drivers for a late delivery, does not change independent contractor status). Given the near-complete absence of supervision and direction that SOSi exercises over the interpreters' work, this factor weighs strongly in favor of independent contractor status.

6. The Level-of-Skill Factor Deserves Greater Weight Than the ALJ Gave It.

It is undisputed that the interpreters are highly skilled, and the ALJ agreed. (JD 48:20-28). All have gone through specialized education and training, and many have multiple years of education. (GC Exh. 296, pp. 2, 22, 30-32, 38-40; Tr. 27-28, 480-481). Although not required, many have sought and obtained state or federal certifications prior to rendering their services to SOSi. (R. Exh. 13, GC Exh. 296, p. 30). Functioning as a competent court interpreter requires far more than being fluent in a particular foreign language. Interpreting requires complex and specialized skills, including memory and analytical skills, concentration skills, and overall language mastery. Interpreters must preserve the style and tone of the speaker in their renditions,

mimicking speech patterns such as hedges, stutters, self-corrections or pauses. They must try to maintain the emotion and intent of the speakers' statements, but are not supposed to soften or enhance the force of messages conveyed or the language used. As for protocol and demeanor, interpreters must interpret in an unobtrusive and impartial manner. (GC Exh. 5, OCIJ Interpreter Handbook, pp. 2, 11). This requires interpreters to be efficient when interpreting, be mindful of their conduct, and to avoid engaging in activities at the courts that might appear biased, such as speaking to witnesses or attorneys off the record or soliciting business from private clients while rendering services at the immigration courts. (*Id.* at pp. 2-3). Interpreters also must master vocabulary that is both unique to the legal profession and to immigration proceedings more specifically. (GC Exh. 5, OCIJ Interpreter Handbook).

In his decision, the ALJ discounted the skill factor by stating that "skill is only one consideration" and "there are numerous professions, such as engineering, computer science, medicine, and performance arts, where workers are incredibly skilled, yet often practice their craft as employees." (JD 48:21-28). However, it remains beyond dispute that the "skill required in the particular occupation" is part of the pertinent common-law factors for determining whether individuals are independent contractors or employees under the Act. Restatement (Second) of Agency § 220(2)(d). The Board likewise has held that a high level of skill favors independent contractor status. *Porter Drywall*, 362 NLRB No. 6, slip op. at 4 (drywall crew leaders' performance of skilled work supported finding that they were independent contractors); *Pennsylvania Academy*, 343 NLRB at 847 (highlighting "high level of skill" in finding models to be independent contractors). It will not do to state that the level of skill is a factor in determining independent contractor status and then to discount it because some highly skilled workers function as employees. The single decision cited by the ALJ, *Metropolitan Opera Ass'n.*, 327

NLRB 740, 740-742 (1999), did not involve any decision about the employment status of the individuals in question. Overall, this factor strongly favors independent contractor status.

7. The Method-of-Payment Factor Favors Independent Contractor Status.

SOSi compensates interpreters either by the job (half-day or full-day) or per hour, depending on the payment scheme negotiated by the interpreter and whether the interpreting assignment is local or requires travel. For travel assignments, interpreters compensated by the job generally negotiate a fixed fee on a case-by-case basis or have negotiated a set flat rate for travel assignments in advance. Interpreters compensated per hour receive a fixed hourly fee, typically with a two or three-hour minimum for non-travel assignments.[5] For travel assignments, they are generally paid using a composite of their hourly rates. Significantly, SOSi does not unilaterally determine the compensation for interpreting assignments. SOSi individually negotiates all of its rates, resulting in widespread variances. (*See* JX 1(ggg); Tr. 1477-1478).

At the time of the hearing, approximately one-third of all 1351 interpreters were compensated by the job, with the remaining two-thirds compensated by the hour.[6] (*See* JX 1(ggg)). The per-job payment scheme points to independent contractor status because interpreters are compensated a fixed amount regardless of how long the assignments lasts. *Porter Drywall, Inc.*, 362 NLRB No. 6, slip op. at 3; *Pennsylvania Academy*, 343 NLRB at 847 (flat, per-job payment indicative of independent contractor status).

[5] Because most hearings conclude well before the stated minimum, hourly-paid interpreters effectively are paid on a job basis.

[6] Between September 2015 and July 22, 2016, out of the approximately 849 interpreters on SOSi's 2015-2016 RTW list, 432 of those interpreters had negotiated hourly rates with SOSi, ranging from $25.00 to $200.00 per hour. (*See* JX 1(fff)). The remaining 417 interpreters negotiated either half-day/full-day rates, flat rates, or some combination of the two. (*Id.*)

The ALJ acknowledged that the per-job payment scheme tended to show independent contractor status. However, he went on to find that the effect "was significantly muted because the unpredictability of how long an assignment would last forced the interpreters to block off the entire day for a SOSi assignment, even if the assignment was only in the morning." (JD 50:40-43). The record, however, does not support this finding. Indeed, the ICAs provide that half-day assignments do not last than four hours and full-day assignments do not run more than eight hours. (*See e.g.*, GC Exh. 4, p. 7; GC Exh. 43, p. 7; GC Exh. 80; GC Exh. 96, p. 7; GC Exh. 113, p. 7; GC Exh. 139, p. 7; GC Exh. 162, p. 7; Tr. 511). Thus, if an interpreter accepts a half-day morning assignment, it would be highly unusual for the interpreter to need to reserve a full workday. Further, the COIs introduced into the record demonstrate that the overwhelming majority of morning and afternoon assignments ended long before noon or 5:00 p.m., allowing ample time for the interpreter to schedule interpreting jobs with other entities or clients. (*See e.g.*, GC Exh. 8; GC Exh. 49; GC Exh. 82). Frequently, a morning or afternoon case would end in 60 to 90 minutes. (*Id.*) Occasionally, the court would send the interpreter to another assignment, but more often the interpreter would be released and free to leave and to engage in whatever personal activities he or she might wish. Even when sent by the court to a second case, the interpreter more often than not would be released by the court well before the end of the half day or full day. However, even assuming that a SOSi assignment did extend beyond noon, there is no obvious reason why the interpreter could not notify the parties involved in the afternoon assignment that he/she had been held over and would be late. Most non-SOSi assignments for interpreters involved private parties such as attorneys, businesses, and schools, rather than courts. A deposition may be scheduled for 2:00 p.m., but any experienced attorney knows that the scheduled start time may be altered for any number of reasons. Opposing counsel may be

running late from a morning court hearing. The deponent or the court reporter may be sick or may have experienced a personal emergency. The same is true for other private assignments. Interpreters also remain in complete control of their schedules and how many SOSi assignments they will accept at all times. Thus, interpreters decide whether to work a SOSi assignment on any given workday, and they can decide whether to reject a morning or afternoon assignment that may conflict with another private interpreting assignment.

The ALJ also found that SOSi's movement toward a more uniform hourly rate structure in September 2016 militated in favor of employee status. (JD 51:5-20). The ALJ characterized these rates as "generally nonnegotiable." (*Id.*) While it is true that in September 2016 SOSi sought to reduce its costs by converting the interpreters into an hourly-based pay structure, it was only partially successful in doing so, and its success or failure turned on the outcome of direct negotiations with individual interpreters. Beginning in September 2016, SOSi finally was in a position to contract with newly qualified interpreters who had not previously worked for Lionbridge. This created a level of competition that had not existed before, and it increased, at least to some degree, SOSi's bargaining power. Of course, this change in respective bargaining power did not occur over night, and the vast majority of former Lionbridge interpreters continued to work at the immigration courts on their original half-day/full-day rate structures. On the other hand, brand new interpreters generally agreed to hourly rate structures with certain minimum hourly guarantees. SOSi also began offering incentives to entice interpreters on a half-day/full-day rate structure to convert to an hourly structure. (*See* JX 1(m)). These incentives were successful to some degree, and some interpreters agreed to the change. But in every case, whatever occurred was the product of individual negotiation. As the record reflects, the rate structure varies greatly from interpreter to interpreter, and each interpreter is free to negotiate.

In *Dial-A-Mattress Operating Corp.*, 326 NLRB 884, 893 (1998), the Board found that truck drivers in that case had "freedom to negotiate special deals" because the record demonstrated that some had done so, and that this freedom did "not become illusory simply because *Dial* rejected offers from other owner-operators under different circumstances." Similarly, here, merely because SOSi moved toward a more uniform hourly rate structure and a number of interpreters accepted those rates where the competition was fierce, does not mean that the rates were nonnegotiable, as the record demonstrates that other interpreters successfully negotiated hourly rates well above the company's designated maximum rates. *See also NLRB v. Associated Diamond Cabs*, 702 F.2d 912, 921 (11th Cir. 1983) (that taxi company "sets the standardized [taxi] lease terms and in some instances unilaterally changes them, even if true, is indicative only of relative bargaining power, not an employee-employer relationship"). Taken as a whole, SOSi negotiates with individual interpreters over their rates of pay and this strongly supports a finding of independent contractor status.

Other facts relevant to the method of payment point to independent contractor status as well. These were largely ignored or arbitrarily discounted by the ALJ all together. Specifically, SOSi does not make deductions from interpreters' pay for taxes; interpreters complete W-9 and 1099 forms for tax purposes; interpreters do not receive medical insurance or other fringe benefits, and interpreters do not receive payment until they submit their COIs, which SOSi processes on a net-30 basis, *i.e.*, within 30 days of receiving the COI submission from the interpreter. These are indicative of independent contractor status. *American Guild of Musical Artists*, 157 NLRB 735, 736 fn. 1 (1966) (focusing on lack of tax withholding in finding musicians to be independent contractors); *Crew One, supra*, 811 F.3d at 1312 (failing to withhold taxes is strong evidence of independent contractor status); *BKN, Inc.*, 333 NLRB 143,

144 (2001) (fact that freelance television writers were paid per episode pursuant to invoices submitted to production company favored independent contractor status).

On balance, this factor favors independent contractor status. At worst, it is neutral.

8. SOSi Does Not Supply Tools or Place of Work.

SOSi agrees with the ALJ that this factor is not overly significant, but disagrees that it is "neutral" because "[n]either party provides the most important instrumentalities of the work—courtrooms and the electronic recording systems." (JD 48:40-41). It is undisputed that SOSi provides interpreters no tools or equipment to perform their jobs. The interpreters do not perform their work at SOSi's operational headquarters in Reston, Virginia. None of the interpreters have any occasion to come to SOSi's headquarters, and they never meet their coordinators in person. All communication is by email, phone, and text messaging. The interpreters operate their businesses out of their homes, although the Los Angeles interpreters did rent an office across from the courthouse that they could use. The interpreters' work on SOSi assignments is performed exclusively at the immigration courts, and the courts control their schedules. Contrary to the ALJ's conclusion, this is strong evidence of independent contractor status. Indeed, the pertinent inquiry under this factor is whether the purported employer provides the workers with the necessary tools or place of work for the job in question. SOSi undisputedly does not and this fact points to independent contractor status.

This case is distinguishable from others where the Board found this factor to be inconclusive because in those cases, unlike here, the putative employers provided at least some of the necessary tools and/or the place of work to the workers. *Lancaster Symphony Orchestra*, 357 NLRB 1761, 1766 (2011) (tools-and-instrumentalities factor was inconclusive where "musicians supply their own instruments and clothes, but the Orchestra supplies music, stands,

chairs, and the concert hall"); *FedEx*, 361 NLRB No. 55, slip op. at 9 (tools-and-instrumentalities factor was neutral where delivery drivers owned their vehicles and paid for maintenance costs associated with trucks operation, but drivers worked out of putative employer's facility and employer dictated vehicle specifications). More on point is the Board's decision in *Pennsylvania Academy*, 343 NLRB 846, 847 (2004), which found independent-contractor status of models for college art classes to be supported by evidence that "the models supply their own robes and slippers and are sometimes requested to bring costumes," and "[i]f they prefer to use padding, poles, and other equipment to support their poses, the models supply those items themselves."

In discounting this factor, the ALJ relied on the fact that "SOSi provides interpreters with scheduling and administrative support, pays for training and certification opportunities with SCSI, and provides guidance on EOIR requirements and instructions on the use of courtroom equipment." (JD 48:45-49:1). But these facts do not establish that SOSi provides the interpreters with the essential tools and instrumentalities or place of work. Scheduling and administrative support is not a tool required for interpreting. Further, that SOSi provides "guidance" on the EOIR's own requirements is also irrelevant as it is clear from the face of the document that it is written by EOIR, not SOSi, to assist interpreters in use of the court's equipment, which itself is owned by the government. (JX 1(hhh), pp. JX000971-972). The requirement that interpreters understand how to use the court-owned equipment applies to all courtroom interpreters, regardless of whether they are independent contractors or employees. Finally, that SOSi pays for training opportunities with SCSI is not a tool or instrumentality in the traditional sense.

Accordingly, this factor tilts in favor of independent contractor status. *See Porter Drywall*, 362 NLRB No. 6, slip op. at 2 (tools-and-instrumentalities factor favored independent

contractor status where drywall crew leaders supplied their own transportation, tools, nails and pipes, even though putative employer also supplied drywall panels). In any event, it is of only limited importance in the overall context of this case.

9. The Length-of-Time Factor Is Neutral.

The ALJ found that the length-of-time factor favors employee status because "interpreters almost universally have an indefinite relationship with SOSi." (JD 49:26-50:2). That is not accurate and is contradicted by the agreed-upon, written terms of the ICAs. Interpreters are primarily on ICAs with explicit one-year terms, coinciding with the optional one-year terms under the EOIR Contract, although some are operating on a series of extensions of their original agreements. (*See e.g.*, GC Exh. 4, JX 1(k), JX 1(l), JX 1(m)). Some interpreters work at the EOIR courts on a fairly regular basis, while others work very sporadically. No interpreter is guaranteed any certain volume of work or assignments. (Tr. 672).

It is certainly true, as the ALJ points out, that when SOSi was initially awarded the EOIR Contract in August 2015, it chose to engage the same interpreters that the predecessor contractor Lionbridge had used for a number of years. However, these interpreters' prior tenure or relationship with Lionbridge has no bearing on the length of time that the interpreters have worked for SOSi, nor does it show that the interpreters are employees of SOSi. SOSi has no relationship to Lionbridge, and these former Lionbridge interpreters rendered their services to the immigration courts pursuant to different independent contractor agreements.

Further, the current case is distinguishable from *FedEx*, a case relied on by the ALJ. There, the delivery drivers entered into one or two year agreements that automatically renewed for subsequent one-year periods after they expired. *FedEx*, 361 NLRB No. 55, slip op. at 14. In contrast, here, the ICAs contained explicit one-year terms, coinciding with the optional one-year

terms under the EOIR Contract. The ICAs did not renew automatically after the expiration of their initial terms and interpreters were aware of this fact. (GC Exh. 4 ¶ 2, GC Exh. 161, Tr. 42-43, 828, 1319). Indeed, as the initial ICAs were scheduled to expire on August 31, 2016, considerable negotiations occurred between SOSi and the individual interpreters. (Tr. 1324-1325, JX 1(ggg), Parts B-D). Numerous interpreters refused to accept these rates and continued thereafter to work for SOSi on multiple contract extensions of their initial ICAs, including the half-day and full-day rates previously negotiated. (*See e.g.*, Tr. 911-912, 931). Other interpreters agreed to hourly rates, but negotiated rates higher than the "maximum," as well as higher guarantees. (Tr. 1324). And some interpreters declined to accept these proposed standard market rates at all. (*See e.g.*, GC Exh. 187). This evidence does not suggest that the interpreters have an expectation of a permanent working relationship with SOSi like employees do. *Lancaster Symphony Orchestra*, 357 NLRB at 1766 ("The fact that the musicians are hired to work in specific programs for a fixed 1-year period favors independent contractor status.").

The ALJ additionally concluded that although intermittent or sporadic work is indicative of independent contractor status, which is the case with some interpreters, the interpreters "remain under contract with the company even if they do not work regularly." (JD 49, n. 26). This is a distinction without a difference, and SOSi is unaware of any legal precedent holding that merely because a worker remains under contract with a company but is not otherwise guaranteed any certain volume of work or required to accept work, he or she cannot be said to be working on an intermittent basis. Indeed, the Board has rejected that notion in at least one case that examined whether truck drivers are independent contractors or employees. *Dial-A-Mattress Operating Corp.*, 326 NLRB at 885, 891 (delivery drivers who signed one-year agreements were independent contractors because, among other things, they were "not required to provide

delivery services each scheduled workday"). Contrary to the ALJ's findings, this factor does not favor employee status; it is neutral.

10. The ALJ Overemphasized the Factors Considering Whether the Interpreters' Work is Part of the Employer's Regular Business and Whether SOSi is in the Business of Interpreting.

SOSi is a federal government contractor. With respect to the EOIR Contract, its business is to provide interpreters to fulfill the demands of the immigration courts. SOSi does not operate, or have any financial interest in, the EOIR courts. Instead, it functions primarily as an intermediary between the EOIR courts and the interpreters. The interpreters are, of course, essential to SOSi in the sense that without them SOSi could not fulfill its contract with DOJ, but their services are really for the benefit of the immigration courts. "The relevant inquiry is 'whether or not the work is part of the regular business of the employer,' Restatement (Second) of Agency § 220(2)(h), not whether the work is essential to the business of [the employer.]" *Crew One Productions, supra*, 811 F.3d at 1313-1314 (finding that stagehands and company that referred stagehands were not engaged in the same business). The relevance of this particular factor is "obscure" and its significance has been questioned. *Minnesota Timberwolves Basketball, LP*, 365 NLRB No. 124, slip op. at 12, n. 48. Respondent contends that to the extent it has any bearing at all here, these factors tilt somewhat in favor of independent contractor status. However, these factors seem so insignificant in this case as to be essentially meaningless.

In finding that these two factors weighed in favor of employee status, the ALJ relied on the Board's decisions in *Lancaster Symphony Orchestra*, 357 NLRB at 1765, and *Sisters' Camelot*, 363 NLRB No. 13, slip op. at 6 (2015). However, those cases are distinguishable because the individuals in issue there were directly intertwined with the day-to-day business operations of the purported employer and the employers' businesses could be characterized as

being in the same business as the individuals in question. For instance, in *Lancaster Symphony*, the Board found that the musicians' work was part of the employer's regular business – the orchestra – because the orchestra was in the business of providing live music to the concert attendees and the musicians performed that music for those same concert attendees. Similarly, in *Sisters' Camelot*, the canvassers at issue directly collected donations for the employer's food-distribution charity. Here, however, the interpreters do not provide interpreting services to SOSi directly. Rather, SOSi functions as an intermediary between the EOIR courts and the interpreters to facilitate the interpreters' rendering of their interpreting services to the courts. Interpreters' interaction with SOSi employees administering the EOIR Contract is also limited. Unlike the musicians in *Lancaster Symphony*, interpreters do not perform their work at SOSi's operational headquarters in Reston, Virginia. Instead, they operate their businesses out of their homes or rented offices. Interpreters spend no time at SOSi's office in Reston interpreting or getting ready to interpret.

Overall, SOSi contends that under the unique facts of this case, these two factors tilt marginally in favor of independent contractor status, although their relevance seems minor in light of the near-total absence of control and supervision over the interpreters' work.

11. The Entrepreneurial Opportunity Factor Favors Independent Contractor Status.

With respect to the entrepreneurial opportunity factor, the ALJ committed multiple errors. First, the ALJ incorrectly found that interpreters were "nominally" free to accept or reject interpreting assignments from SOSi, but if an interpreter rejects an assignment, SOSi retaliates against the interpreter. Second, the ALJ failed to consider the undisputed and ample evidence showing that interpreters can and do perform work for other entities, and in the context of the interpreting profession, this is indicative of entrepreneurial opportunity.

In *FedEx*, 361 NLRB No. 55 slip op. at 3, the Board stated that this factor considers "whether purported contractors have the ability to work for other companies, can hire their own employees, and have a proprietary interest in their work." Here, interpreters are completely in control of their schedule by virtue of the freedom to accept or decline any offered assignment. (Tr. 1429-1430, 1434-1436). The freedom to decide between, for instance, accepting a half-day assignment from SOSi or rejecting it and accepting an assignment from another client that might pay more or might be for a greater number of hours is the essence of what it means to be an entrepreneur. Indeed, the record is clear that interpreters decide if, when, and how many assignments they will perform for SOSi in any given day, month, or year. In doing so, the interpreters control how much, or how little, money they will earn by working for SOSi, and how much, or how little, money they will make from other clients. As a result, interpreters enjoyed a lifestyle that permitted them considerable freedom as well as an income that, if calculated on an hourly basis, was high relative to the prevailing wage rate for interpreters nationwide. (*See* Tr. 45, 179, 468, 1319, 1372-1373).

The ALJ's finding that interpreters are not free to accept or reject assignments offered by SOSi is contradicted by the record. Interpreters are, in fact, free to accept or reject assignments and SOSi does not retaliate against interpreters regardless of their decision. (Tr. 1429-1430, 1434-1437, 1444). The interpreters confirmed this fact either through direct testimony or indirectly through testimony demonstrating that they turned down cases that did not meet their preferences, including cases with immigration court judges whose hearings ran long, cases involving detained aliens (i.e., within the government's custody), or cases in certain locations. (Tr. 156, 225-226, 345-346, 699, 939, 1020, 1035-1036).

The record also reflects that interpreters did in fact work for other private interpreting

clients while under contract with SOSi. Jo Ann Gutierrez-Bejar, accepted interpretation work from other agencies and companies, including from LRA, Tony Barrier, De La Torre Interpreting, and One Call. (Tr. 44). Interpreter Rosario Espinosa performed work for other clients, including law firms and other freelance interpreting agencies, such as ProCare, Access On Time, and Fluent/Pacific Interpreters. (Tr. 562, R. Exh. 8). This evidence is consistent with independent contractor status in the freelance language interpreting profession and distinguishable from the cases relied upon by the ALJ, in which it is industry practice for employees to work part-time for multiple employers, such as those employees in the entertainment industry. *Lancaster Symphony Orchestra*, 357 NLRB at 1763 (orchestra musicians); *Sisters' Camelot*, 363 NLRB No. 13, slip op. at 7 (canvassers raising donations).

The ALJ's reliance on the fact interpreters cannot hire outside persons to perform their interpreting work for SOSi and cannot transfer assignments without permission is also misplaced. Under the EOIR Contract, SOSi is contractually required to ensure that the interpreters meet EOIR requirements in advance of the assignment. (*See* JX 1(a) ¶ C.3.5, JX 1(f) ¶ C.3.5). It would be difficult for interpreters hiring their own employees to provide the similar guarantees of EOIR-Contract compliance, and it would be poor business management for SOSi to leave this task up to the interpreters' discretion and judgment. Thus, this case is distinguishable from the line of Board decisions involving truck drivers cited by the ALJ, wherein the work was more fungible and could be performed by selecting another truck driver.

Similarly, the reason that SOSi requests that permission be sought prior to transferring assignments is to ensure that the name of the interpreter assigned to the hearing in the EOIR's computer system matches the name of the interpreter submitting the COI for payment. (Tr. 1440-1442, 1449-1450). Where that does not occur, problems may arise when the EOIR attempts to

reconcile the name of the interpreter assigned to the hearing and the name of the interpreter submitting the COI for payment. (*Id.*, *see* R. Exh. 25). And, in practice, interpreters were permitted to transfer assignments to other qualified interpreters, provided they notified their coordinator and obtained approval, and such approval was not unreasonably withheld. (*See* R. Exhs. 22, 26; GC Exhs. 10, 12, 14).

The ALJ found that because SOSi "completely controls" who is offered an assignment, interpreters were limited in their entrepreneurial opportunity with SOSi. The ALJ, however, overstates SOSi's control over the assignment process. SOSi offers interpreters assignments based on the interpreters own independent schedules and preferences. Thus, interpreters advise SOSi of when and where they are available, and the regional coordinators utilize this information to offer assignments. If the interpreter declines the assignment, the regional coordinator will offer it to another interpreter, who is free to accept or decline as well. (*Id.*, Tr. 1429-1430). If the interpreter accepts the assignment, the coordinator sends an email confirmation with the details of the assignment. (*Id.*, R. Exh. 35). When an interpreter accepts an assignment, the interpreter agrees to cover that case, but to the extent that he or she decides to later cancel the assignment after accepting, SOSi has no recourse or control over the interpreter's decision, and interpreters have cancelled previously accepted assignments without reprisals, including such reasons as family emergencies, more lucrative assignments, and health issues. (Tr. 1434-1436).

But even if it could be said that SOSi "controls completely" who is offered a particular assignment, that right is more indicative of independent contractor status than it is of employee status. Indeed, it is universally true of independent contractor arrangements. SOSi offers interpreting assignments to specific interpreters in the same fashion that a trucking company offers specific deliveries to specific independent drivers and a manufacturing company places

orders with a specific supplier. In every case where the universe of available choices is greater than one, the contracting entity chooses among competing entities or individuals. That is the nature of competition among competing businesses. Those businesses that provide the best service at the best price with the greatest flexibility will inevitably prosper over lesser competitors. In the employment context, however, there is seldom any real competition. A set group of employees is hired to perform discrete services on a regularly recurring basis. Each employee comes to work at the assigned time, stays for the assigned shift or period of work, and reappears the next scheduled day and time. There are no ongoing offers and acceptances and no meaningful competition among the defined group of employees.

Further, the ALJ's finding that interpreters lacked entrepreneurial opportunity because they cannot solicit business while working on SOSi assignments is legally unsound. As noted elsewhere, EOIR, not SOSi, prevents interpreters from passing out business cards and soliciting business while working at the immigration courts. This ensures that interpreters remain independent and impartial when acting as government-sanctioned court interpreters. (GC Exh. 5, p. 4). Indeed, even when the prohibition is not stated affirmatively, it is well understood simply as a matter of intuition and basic protocol that *while one is engaged in providing services for one client*, one does not solicit business from other clients, be they current or merely prospective. What is important for purposes of the independent contractor analysis is that *at all other times* the interpreters were free to, and did, solicit business from other persons and entities.

Lastly, the ALJ finds that interpreters' entrepreneurial opportunity is further limited because the length of SOSi's interpreting assignments are unpredictable, which, the ALJ reasoned, made it difficult for an interpreter to accept an interpreting assignment for another client after accepting a morning case with SOSi. But this is neither factually true, nor legally

significant. If an interpreter accepts a half-day morning assignment from SOSi, it would be the rare exception that such assignment would last more than four hours. Thus, interpreters could schedule an afternoon assignment following a morning assignment with SOSi. Indeed, the record demonstrates that the overwhelming majority of morning and afternoon assignments ended long before noon or 5:00 p.m., allowing ample time for the interpreter to schedule interpreting jobs with other entities or clients. Any reasonably motivated interpreter could, if he or she desired, accept a morning assignment with SOSi and an afternoon assignment with another client, or vice-versa. But again, even if an interpreter felt constrained not to accept assignments with other clients on days when he or she had accepted an assignment from SOSi, this is nothing more than a reflection of opportunity cost. Whenever any contractor accepts an assignment from one client, that contractor is inherently constrained in his/her ability to accept a competing assignment from another client. In such situations, the contractor must weigh the value of the competing assignments and decide which opportunity is more valuable. Not surprisingly, because the interpreters had extracted from SOSi rates that were substantially above market, most interpreters chose SOSi assignments over other interpreting opportunities, real or prospective. That is the essence of being an independent businessperson. More significantly, interpreters always retained the unfettered right to reject any assignment offered by SOSi or to cancel an accepted SOSi assignment in favor of working for a different interpreting client.

It is highly significant that the interpreters' business relationship with SOSi allows interpreters to work for other entities. Contrary to the ALJ's finding, this is not an illusory or nominal right. Interpreters can freely turn down work in favor of more lucrative interpreting assignments with private clients or other non-interpreting assignments, and this supports a finding of independent contractor status. *DIC Animation City*, 295 NLRB 989, 991 (1989)

(concluding that writers are independent contractors where no "practical exclusivity" existed between writers and putative employer); *cf. FedEx*, 361 NLRB No. 55, slip op. at 15 ("It is also highly significant that drivers' arrangement with FedEx effectively prevents them from working for other employers.").

The entrepreneurial opportunity factor supports a finding of independent contractor status. At worst, it is a neutral factor.

12. The Interpreters are Independent Contractors.

In summary, when all of the relevant factors are properly considered, the interpreters are clearly properly classified as independent contractors. The two most important factors—right to control details of work and mutual intent of the parties—heavily favor a finding that the interpreters are independent contractors. With these two critical factors supporting an independent contractor finding, it is difficult to conceive of any scenario in which the other factors could be said to dictate a different result. After all, the Board does not simply count up the factors to compare how many support one finding as opposed to an opposite finding. Importantly, however, these are not the only factors that favor an independent contractor finding. The interpreters are highly skilled and they perform their services without any actual supervision or oversight by SOSi. SOSi provides no tools or equipment to the interpreters, and maintains no facility where interpreters gather or are based. The interpreters are free to accept or reject offered assignments as they wish. Some interpreters work fairly regularly at the immigration courts and others work only sporadically. Most interpreters perform interpreting services for other clients, often on a regular basis. Interpreters operate out of their homes and they perform their services at the immigration courthouses. They file tax returns as independent contractors and take deductions available to independent contractors. Regarding exclusivity, the interpreters

affirmatively negotiated the independent contractor language in their ICAs, which was modified at the interpreters' requests to make abundantly clear that an independent contractor relationship was being created. The interpreters also successfully negotiated half-day and full-day rates of pay that were substantially higher than what they had been paid at Lionbridge. The only factor that may weigh in the opposite result is that certain interpreters are paid per hour, but this isolated fact is outweighed by the totality of the other factors, particularly the lack of control and mutual intent factors, and it is undercut by the fact the hourly rates were the direct product of bilateral negotiations between the parties. Under these facts, the ALJ's conclusion that the interpreters are employees is contrary to law and not in harmony with the actual working relationship between the parties. SOSi requests that the Board reverse the ALJ and find that the interpreters are independent contractors, not covered by the Act.

B. Alternatively, EOIR Is a "Joint Employer," and SOSi Shares the Government's Exemption. The Board Should Refrain From Exercising Jurisdiction.

SOSi has raised an affirmative defense that if the interpreters are found to be employees of SOSi, the United States is a joint employer of these interpreters and SOSi shares the government's exemption. Of course, if the Board agrees with Respondent that the interpreters are independent contractors, this affirmative defense need not be addressed. Because the ALJ did not address this defense in his decision, Respondent raises it here.

Although SOSi is not itself a government entity, EOIR indisputably is an exempt government agency. Thus, the question arises as to whether, given the close relationship between SOSi and EOIR, the Board should find either that SOSi shares EOIR's exemption under § 2(2) of the Act or even if SOSi is not itself exempt, the Board should exercise its discretion to withhold jurisdiction. Historically, the Board has applied a variety of tests to answer this question. In *Ohio Inns, Inc.*, 205 NLRB 528, 528-529 (1973), the Board declined to exercise

jurisdiction over a lodge that operated under a contract with the Ohio Department of Natural Resources. The Board found that the Ohio agency had such control over the lodge that they were joint employers and that "it would not effectuate the policies of the Act to assert jurisdiction over a private employer because the state is a joint employer." *Ohio Inns*, 205 NLRB at 529. In *National Transportation Service*, 240 NLRB 565, 565-566 (1979), the Board, without overruling the *Ohio Inns* joint employer test, applied a more relaxed standard, and held that it would decline to exercise jurisdiction if the employer, because of its relationship with an exempt entity, lacked sufficient control over terms of employment to engage in "effective" or "meaningful" collective bargaining. Subsequently, in *Res-Care, Inc.*, 280 NLRB 670, 672 (1986), the Board reaffirmed *National Transportation,* but clarified that it would "examine closely not only the control over essential terms and conditions of employment retained by the employer, but also the scope and degree of control exercised by the exempt entity over the employer's labor relations, to determine whether the employer in issue is capable of engaging in meaningful collective bargaining."

In *Management Training Corp.*, 317 NLRB 1355, 1355 (1995), the Board found that the *Res Care* standard was "unworkable and unrealistic," *Id.*, and that henceforth, it would "only consider whether the employer meets the definition of 'employer' under Section 2(2) of the Act, and whether such employer meets the applicable monetary jurisdictional standards." *Id.* at 1358. Although the *Res-Care* decision was not premised on any showing that the employer and the exempt entity were "joint employers" and there was no need for the Board to address the *Ohio Inns* joint employer question, the Board dropped a footnote in which it stated that it would "continue to find, as in *Res-Care*, 280 NLRB at 673 n. 12 and n. 14, that we will not employ a joint employer analysis to determine jurisdiction." 317 NLRB at n. 16. This dicta, however, was

a clear misinterpretation of what the *Res-Care* Board held. In footnote 12, the *Res-Care* Board, referencing a prior Board decision in *ARA Services,* 221 NLRB 64, n.7 and 65, n. 11 (1975), stated: "Although the Board there concluded that the employer shared the statutory exemption of the county because the county was a joint employer of the employer's employees, we do not rely on the Board's joint employer analysis. *We do not require a finding* that the exempt entity is a joint employer in order to withhold the assertion of jurisdiction." (Emphasis supplied). The *Res-Care* Board clearly was not *rejecting* the proposition that a finding of a joint employer relationship between an employer and an exempt entity would warrant the Board in withholding jurisdiction over the employer. What it was saying was that such a finding was not *required* to withhold jurisdiction. The *Res-Care* Board established a separate *lower* standard for withholding jurisdiction than the *Ohio Inns/ARA Services* joint employer test. When the *Management Training* Board overruled *Res-Care,* there was no need for it to address the more rigorous joint employer standard because no one was contending that the record was sufficient to find joint employer status. Thus, in stating that it was overruling *Ohio Inns,* the *Management Training* Board decided an issue that was not really before it and it did so on the basis of a misreading of *Res-Care*.

Respondent contends that the Board should disavow the *Management Training* dicta, and reinstate the *Ohio Inns/ARA Services* joint employer analysis in which the Board will not exercise jurisdiction over an entity where its employees are jointly employed by the United States. Exercising jurisdiction in such circumstances risks embroiling the United States in private disputes, as well as undermining the government exemption. Further, as the facts of this case demonstrate, meaningful collective bargaining is not effective when the United States actually controls the work and dictates the manner in which it will be performed. Alternatively, the Board

should return to the *Res-Care* standard in which the Board looks at the control exercised by the exempt entity over the labor relations of the non-exempt entity to determine whether meaningful collective bargaining is feasible.

Under either standard, the Board should decline to exercise jurisdiction here. If the record is sufficient to establish that the interpreters are employees of SOSi, it certainly is sufficient to establish that EOIR is a joint employer of the interpreters. After all, it is EOIR who establishes all policies, controls all work, and oversees the work of the interpreters. Whatever "control" SOSi may be said to exercise over the interpreters pales in comparison to that exercised by EOIR. As the EOIR is an arm of the United States and exempt from the Act's coverage, Respondent shares that exemption. Alternatively, it would not effectuate the purposes of the Act for the Board to exercise jurisdiction over SOSi.

C. Because the Interpreters are Independent Contractors, the ALJ Erred in Concluding that SOSi Discriminated Against The Alleged Discriminatees.

For the reasons discussed, *supra*, the interpreters are independent contractors not covered by the Act. Program management determined that Estrada, Magana, Gutierrez-Bejar, Rivadeneira, Portillo, and Morris were acting against SOSi's interests and undermining SOSi's ability to perform on the EOIR Contract. As independent contractors, their activities were unprotected, and SOSi lawfully decided not to renew their contracts. SOSi had no obligation to continue to contract with interpreters who were not effectively serving SOSi's interests. Respondent requests that these allegations be dismissed.

D. The ALJ Erred in Ordering a General Reclassification Remedy.

The ALJ correctly found that the mere misclassification of employees as independent contractors is not an unfair labor practice. Nevertheless, in fashioning a remedy, he ordered SOSi to reclassify all interpreters as independent contractors. This remedy is clearly overly broad and

inappropriate, even assuming, *arguendo*, that the ALJ properly found the interpreters to be statutory employees. Board remedies must be narrowly tailored to effectuate the purposes of the Act. Given the ALJ's finding that mere misclassification of employees is not itself a violation of § 8(a)(1), there is no unfair labor practice finding to which the ALJ's reclassification remedy relates. Further, reclassification is not necessary to effectuate any reinstatement and backpay remedy that may be found appropriate. And ordering such reclassification potentially impacts SOSi's obligations under other state and federal statutes over which the Board has no expertise or authority and which may employ different legal standards for determining whether a person is an employee or an independent contractor. Because a reclassification remedy does not effectuate the purposes of the Act and does not relate to any specific unfair labor practice, the Board should decline to impose such a remedy.

E. The ALJ Erred in Finding Various Independent Violations of Section 8(a)(1).

For the reasons discussed, *supra*, the interpreters are independent contractors not covered by the Act and they possess no Section 7 rights. Because all of the § 8(a)(1) violations found by the ALJ are hinged on the interpreters being found to be statutory employees, reversal of the ALJ's finding of employee status dictates that these alleged § 8(a)(1) violations be dismissed.

Alternatively, even if the interpreters are in fact statutory employees, the ALJ's findings are without merit. On December 14, 2017, the Board issued its decision in *Boeing Co.*, 365 NLRB No. 154, slip op. at 3-4 (2017), which established a new standard for assessing the legality of workplace rules. Under the new standard, the Board explained that when reviewing a facially neutral rule that, when reasonably read would possibly interfere with Section 7 rights, the Board will balance the: (1) "nature and extent" of the potential impact on those rights; and

(2) the legitimate justifications associated with the rule.[7] *Boeing Co.*, slip op. at 3-4.

Here, the ALJ incorrectly found that the Code of Business Ethics and Conduct ("Code") and Publicity Clause violated § 8(a)(1) under the Board's new balancing test by reading the language in isolation and misconstruing it. With respect to the Code, the ALJ found that its provisions on protecting confidential information, communicating on social media and with the press, and using SOSi's assets were unlawful. However, a reasonable reading of the provisions as a whole, which is required by Board precedent, *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998), evidences a common-sense effort by SOSi to maintain the privacy and dissemination of its confidential employee or own proprietary information, not an effort to infringe on Section 7 rights. Indeed, the vast majority of conduct affected by these provisions is unrelated to Section 7. The first sentence of the confidentiality provision, which the ALJ disregarded, indicates that its reach is limited to the improper dissemination of "*colleagues'* personal information." (GC Exh. 45, p. 6). Thus, it is not reasonably understood as limiting communications of details that a person knowingly shares about himself/herself. (*Id.*) Rather, the provision limits accessing or disclosing confidential records of other SOSi personnel, which is made even clearer because the provision also limits dissemination of a person's "health status." (*Id.*) The social media and press provisions contain language indicating that their restrictions would be understood as limiting communications made by interpreters in their capacity as SOSi-contract interpreters. (*See id.* at 10-11). Thus, interpreter communications from their private social media platforms would be excluded. Interpreters would reasonably construe the Publicity Clause in a similar manner.

[7] The General Counsel recently noted that under the new *Boeing* test, "ambiguities in rules are no longer interpreted against the drafter, and generalized provisions should not be interpreted as banning all activity that could conceivably be included." GC Memorandum 18-04 (June 6, 2018), citing *Boeing Co.*, slip op. at 9 & n. 43. The ALJ's reliance on these principles to find that these provisions violated the Act is therefore also misplaced. (*See* JD 58:26-29; 61:2-7, 26-29; 62:3-6).

Further, the ALJ completely misread the use-of-company-assets provision, which actually includes a pertinent carve-out for reasonable personal use of equipment. (GC Exh. 45, p. 10). SOSi's file sharing system does not allow for two-way communications, *see* Tr. 1231-1232, so contrary to the ALJ's finding, interpreters cannot in fact use the system to communicate in the first place. SOSi uses the system to distribute ICAs and related documents to interpreters, and interpreters freely communicate thereafter with SOSi and their colleagues using non-SOSi email addresses.

There is no "blanket ban" on the use of company equipment. Moreover, SOSi's justifications for the provisions and Publicity Clause are outweighed by any impact on Section 7 rights. SOSi, as a government contractor, is legally and contractually obligated to adopt safeguards to protect against the improper disclosure of private government and personal data. Demanding that interpreters avoid improper disclosures or offensive language and, when in doubt, seek guidance from SOSi before making online statements on its behalf, are part and parcel of its workplace-specific compliance and civility efforts. Finally, SOSi's counsel's communications are not unlawful as their admonitions pertain to sharing of *another interpreter's* confidential data. At the time the letters were mailed, interpreters were aware that an interpreter's private data had been breached. It is not unlawful for an entity to caution a person against sharing such data.

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CONCLUSION

For the foregoing reasons, SOSi respectfully requests that the Consolidated Complaint be dismissed in its entirety. Submitted this 8th day of August 2018.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of Respondent SOS International LLC's Brief in Support of its Exceptions to the Decision of the Administrative Law Judge, which was filed today using the Board's electronic filing system, was served on the following persons by electronic mail:

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Dated this 8th day of August 2018.

/s/ Charles P. Roberts III